Supreme Court, U. S.
FILED
NOV 14 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT FILED JULY 27, 1979
PROBABLE JURISDICTION NOTED OCTOBER 1, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

INDEX TO APPENDIX

	PAGE
Chronological List of Relevant Docket Entries	1
Verified Petition and Complaint of Consolidated Edison Company of New York, Inc.	2
Exhibit IV	10
Verified Answer of the Public Service Commission of the State of New York	19
Exhibit A	23
Exhibit D	49
Exhibit E	52

PAGE

Verified Reply of Consolidated Edison Company of New York, Inc. 61

Judgment of New York Supreme Court, Albany County 64

Notice of Appeal of the Public Service Commission of the State of New York to New York Supreme Court, Appellate Division, Third Judicial Department 69

Order of New York Supreme Court, Appellate Division, Third Judicial Department 70

Notice of Appeal of Consolidated Edison Company of New York, Inc. to Court of Appeals of the State of New York 72

The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the Jurisdictional Statement:

PAGE

Public Service Commission's Statement of Policy on Advertising and Promotional Practices of Public Utilities, issued on February 25, 1977 ..... 31a

Public Service Commission's Order Implementing Certain Restrictions on Utility Advertising, issued on February 25, 1977 ..... 57a

Public Service Commission's Order Denying Petitions for Rehearing, issued on July 14, 1977 ..... 59a

Opinion of the New York Supreme Court, Albany County, issued on February 17, 1978 ..... 24a

Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, issued on July 27, 1978 ..... 16a

Opinion of the Court of Appeals of the State of New York, issued on May 1, 1979 ..... 1a

Final Judgment of the Court of Appeals of the State of New York, entered on May 1, 1979 ..... 29a

Chronological List of Relevant Docket Entries

11- 7-77	Verified Petition and Complaint Served.
11-28-77	Verified Answer Served.
12- 5-77	Verified Reply Served.
2-17-78	Opinion of the New York Supreme Court, Albany County, issued.
3- 6-78	Judgment of the New York Supreme Court, Albany County, entered.
3- 6-78	Notice of Appeal to the New York Supreme Court, Appellate Division, Third Judicial Department, served and filed.
7-27-78	Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, issued.
8- 2-78	Order of the New York Supreme Court, Appellate Division, Third Judicial Department, entered.
8- 9-78	Notice of Appeal to the Court of Appeals of the State of New York served.
8-14-78	Notice of Appeal to the Court of Appeals of the State of New York filed.
5- 1-79	Opinion of the Court of Appeals of the State of New York issued.
5- 1-79	Final Judgment of the Court of Appeals of the State of New York entered.
6-26-79	Notice of Appeal to the Supreme Court of the United States served and filed.

Verified Petition and Complaint of Consolidated Edison Company of New York, Inc.

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 11163-77

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

for a judgment pursuant to Article 78 of the CPLR,

—against—

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

—against—

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,

Defendant.

Petitioner-Plaintiff CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Con Edison) by its attorneys, as and for its petition and complaint herein against respondent-

defendant PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (the Commission), alleges:

NATURE OF PROCEEDINGS

1. This is a special proceeding together with actions for a declaratory judgment and an injunction seeking, on grounds of unconstitutionality, to set aside and enjoin the enforcement of certain orders of the Commission which prohibit Con Edison and other public utility corporations in this State from utilizing printed matter inserted with bills mailed to customers (bill inserts) as a means of expressing the views of such public utility corporations on "controversial matters of public policy." Since the expression of views on controversial subjects is precisely the liberty that is protected, to individuals and corporations alike, by the constitutional safeguards against infringement of freedom of speech and of the press, this restriction on Con Edison's freedom to communicate is a gross violation of the First Amendment to the United States Constitution as made applicable to the States by the Due Process Clause of the Fourteenth Amendment, and of similar provisions of the Constitution of the State of New York.

CAUSE OF ACTION FOR REVIEW UNDER
ARTICLE 78 OF THE CPLR

2. Petitioner-Plaintiff, Con Edison, is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal office at 4 Irving Place, New York, New York. Con Edison supplies electric service in five boroughs of New York City—Manhattan, The Bronx, Brooklyn, Staten Island and most of

Queens—and in portions of Westchester County; gas service in Manhattan, The Bronx and in parts of Queens and Westchester; and steam service in parts of Manhattan.

3. Respondent-Defendant, the Commission, is an administrative body organized and existing under the Public Service Law of the State of New York, charged with the responsibility by such law of regulating the rates and service of Con Edison with respect to the furnishing of electricity and gas (Article 4) and steam (Article 4-A). The Commission's principal office is in the City and County of Albany.

4. The orders and prohibitions at issue herein have been promulgated by the Commission under color of the authority granted to it by Articles 4 and 4-A of the Public Service Law.

5. Pursuant to Sections 73 and 86 of the Public Service Law, the Commission may impose forfeitures against Con Edison, or any officer, agent or employee thereof, for each violation of an order of the Commission.

6. Due to their effectiveness and relatively low cost, bill inserts constitute the principal means available to Con Edison for communicating information and views to its customers. There are no adequate alternatives.

(a) Con Edison utilizes bill inserts to convey messages required by the Commission's regulations or by law to be sent to its customers, and to communicate information on such topics as new rates, company procedures, safety in the use of the company's services, and conservation.

(b) In addition, Con Edison has utilized bill inserts, and desires to continue to utilize bill inserts, to communicate information and its views to its customers on subjects which are of importance to them as consumers of utility services. The Commission itself, in its policy statement (hereinafter more fully referred to in paragraph 7 below), has recognized the importance of such communication by stating that "The expression of a utility's views on a controversial issue may truly reflect its concern for the welfare of its consumers and may make a genuine contribution to a public policy debate. . ." Examples of the issues presently confronting the utility industry which have a significant bearing upon its consumers, and with respect to which the Commission's orders prohibit Con Edison from communicating its views to its customers by means of bill inserts, are the use of nuclear power to provide the needs of consumers for electric energy, the replacement of investor-owned utility service by government-owned facilities, the siting of power plants and other similar matters.

7. Notwithstanding the foregoing, on February 25, 1977, the Commission issued a "Statement of Policy on Advertising and Promotional Practices of Public Utilities" in which it announced (at p. 11) that

> "we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy."

(A certified copy of the Commission's Statement of Policy is annexed hereto as Exhibit I). [Printed in the appendix to the Jurisdictional Statement (31a-56a)]

8. The Commission's Statement of Policy relating to the use of bill inserts was implemented by an order issued on February 25, 1977, which provides that

> "All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy."

(A certified copy of the Commission's February 25, 1977, order is annexed hereto as Exhibit II). [Printed in the appendix to the Jurisdictional Statement (57a-58a)]

9. On or about March 22, 1977, Con Edison applied to the Commission for rehearing pursuant to Section 22 of the Public Service Law, and on or about June 3, 1977, Con Edison filed with the Commission a supplement to its petition for rehearing. (Copies of Con Edison's petition for rehearing and the supplement to its petition for rehearing are annexed hereto as Exhibits III and IV, respectively). [Exhibit III omitted in printing]

10. By order issued on July 14, 1977, the Commission denied Con Edison's petition for rehearing. (A certified copy of the Commission's July 14, 1977, order is annexed hereto as Exhibit V). [Printed in the appendix to the Jurisdictional Statement (59a-71a)]

11. In forbidding Con Edison from using bill inserts to express its views on issues of importance to it and its customers, as hereinabove alleged, the Commission has unlawfully instituted a program of government censorship

and placed a prior restraint upon Con Edison's communications with its customers in violation of Con Edison's rights under the First and Fourteenth Amendments to the Constitution of the United States and under Article 1, § 8 of the Constitution of the State of New York.

12. In adopting a standard which permits Con Edison to use bill inserts to communicate "noncontroversial" matters to customers but forbids Con Edison from using bill inserts to communicate "controversial" matters to customers, the Commission has purported to regulate speech on the basis of content in violation of the First and Fourteenth Amendments to the Constitution of the United States and Article 1, § 8 of the Constitution of the State of New York.

13. In promulgating an order which purports to permit the expression of "noncontroversial" ideas but bans the dissemination of "controversial" material in bill inserts, the Commission has enunciated a standard for the regulation of communicative activity which a) fails to provide adequate notice of the scope of its proscription and b) fails to provide adequate guidance for its application and, thus, is void for vagueness under the First and Fourteenth Amendments to the Constitution of the United States and under Article 1, §§ 6 and 8 of the Constitution of the State of New York.

14. As a consequence of the Commission's orders, Con Edison is suffering irreparable injury by being prohibited from utilizing an effective and economical means of communicating information and views to its customers on "controversial matters of public policy."

15. The Commission's orders have substantially diminished Con Edison's ability to communicate information and views to its customers on issues of concern to Con Edison and its customers.

16. Con Edison has no plain, speedy, or adequate remedy at law.

CAUSE OF ACTION FOR DECLARATORY JUDGMENT

17. Con Edison repeats the allegations contained in paragraphs 1-16.

CAUSE OF ACTION FOR INJUNCTION

18. Con Edison repeats the allegations contained in paragraphs 1-16.

19. By application dated March 22, 1977, Con Edison applied to the Commission for stay of its order of February 25, 1977. Con Edison's application was denied by order of the Commission issued on March 30, 1977. (A certified copy of the Commission's order of March 30, 1977, is annexed hereto as Exhibit VI). [Omitted in printing]

WHEREFORE, Con Edison respectfully requests this Court to:

(1) review under Article 78 of the Civil Practice Law and Rules the orders of the Public Service Commission of February 25 and July 14, 1977, to the end that judgment be entered annulling, vacating and setting aside such orders to the extent they prohibit Con Edison from utilizing bill

inserts as a means of disseminating its views on controversial matters of public policy;

(2) declare that the Public Service Commission's orders of February 25 and July 14, 1977, to the extent they prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy, violate the First and Fourteenth Amendments to the Constitution of the United States, and Article 1, §§ 6 and 8 of the Constitution of the State of New York;

(3) grant judgment enjoining the Public Service Commission from enforcing its orders of February 25 and July 14, 1977, to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy; and

(4) grant Con Edison such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
November 7, 1977

(Subscription and verification omitted in printing)

• • •

Exhibit IV Appended to Verified Petition and Complaint

BEFORE THE NEW YORK STATE

PUBLIC SERVICE COMMISSION

In the Matter of

STATEMENT ON POLICY ON ADVERTISING AND PROMOTIONAL PRACTICES OF PUBLIC UTILITIES

PSC Case No. 27052

SUPPLEMENT TO PETITION FOR REHEARING OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

To the Public Service Commission of The State of New York:

Consolidated Edison Company of New York, Inc. hereby supplements its Petition for Rehearing dated March 22, 1977, for the purpose of bringing to the attention of the Commission the implications to this case of the decision of the United States Supreme Court on May 2, 1977 in the case of *Linmark Associates, Inc.* v. *Willingboro,* 45 U.S.L.W. 4441.

By its "Statement of Policy on Advertising and Promotional Practices of Public Utilities" and accompanying order, issued on February 25, 1977, the Commission prohibited the use of bill inserts by utility companies for the purpose of communicating their opinions or viewpoints on controversial issues of public policy.

In its Petition for Rehearing dated March 22, 1977, Con Edison alleged that the prohibition was unlawful for several reasons, including the reason that the prohibition

abridged Con Edison's freedom of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution. With respect to the anticipated argument that the prohibition is justifiable on the ground that alternative means are available for communication of the utilities' viewpoints, we pointed out (at p. 10 of our Petition for Rehearing) that the Supreme Court has said that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State,* 308 U.S. 147, 163 (1939); *See also, Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 757-58, n. 15 (1976).

The availability of alternative means of communication has been deemed to be a relevant consideration in cases involving "time, place, and manner" restrictions. As the Supreme Court stated in *Virginia Pharmacy*:

> "We have often approved [time, place, and manner restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." *Ibid.* at 771.

The Commission's prohibition cannot be justified as a proper time, place, and manner restriction because it regulates the content of communications, and under the principles of the decisions cited above the fact that alternative means of communication are available is not a relevant consideration. However, since the matter of alternative means of communication is specifically addressed in the United States Supreme Court's opinion in the recent *Lin-*

mark case, we now wish to show that even if alternatives were considered, it must be concluded that Con Edison has no adequate alternatives to bill inserts under the *Linmark* standards.

In *Linmark*, the Supreme Court struck down a municipal ordinance which prohibited the posting of real estate "For Sale" or "Sold" signs. The municipality attempted to justify the ordinance in part on the ground that it restricted only one method of communication, and that alternatives were available for communication of the sellers' messages.*

The standards utilized by the Supreme Court in analyzing this argument may be found in the following passage from the *Linmark* decision:

> "... serious questions exist as to whether the [Willingboro] ordinance 'leave[s] open ample alternative channels for communication.' *Virginia Pharmacy, supra,* 425 U.S., at 771. Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with realtors—involve more cost and less autonomy than 'For Sale' signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective

* At the trial of the *Linmark* case in the District Court, the Court found that "approximately thirty percent of inquiries to [plaintiff's real estate] office are a result of 'For Sale' signs being posted on residences." The opinion of the district court is reproduced in the opinion of the Court of Appeals, *Linmark Associates, Inc.* v. *Willingboro,* 535 F.2d 786, 792, n.5. (3rd Cir. 1976). Seventy percent of plaintiff's inquiries thus came from sources other than "For Sale" signs.

> media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold. The alternatives, then, are far from satisfactory." *Ibid.* at 4443 (citations omitted).*

As indicated in the affidavit of Robert O. Lehrman, attached hereto and made a part hereof, Con Edison has no adequate alternatives to the use of bill inserts for communicating to its customers its views on controversial matters of public policy. A separate mailing would be prohibitively expensive. Television and radio advertising are not suitable means of communicating lengthy messages on complicated subjects. And newspaper advertising is more costly and less effective than bill inserts.

* In *Linmark*, the Court also considered the constitutionality of achieving governmental objectives by restricting the free flow of truthful information, and concluded that:

> "the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information." *Ibid.* at 4444.

The Court continued by referring to its decision in *Virginia Pharmacy,* where it rejected Virginia's claim that the only way it could enable its citizens to find their self interest was to deny them information that is neither false nor misleading:

> "'There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that information is not in itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.'" *Linmark Associates, Inc.* v. *Willingboro, supra* at 4444, quoting *Virginia Pharmacy, supra,* 425 U.S. at 770.

Exhibit IV Appended to Verified Petition and Complaint

WHEREFORE, your petitioner, the Consolidated Edison Company of New York, Inc., respectfully requests that for the reasons stated herein and in our Petition for Rehearing, the Commission grant rehearing and amend its Statement of Policy on Advertising and Promotional Practices of Public Utilities by revoking the prohibition as to the use of bill inserts by utility companies for the purpose of communicating their opinions or viewpoints on controversial issues of public policy.

Dated: New York, New York
June 3, 1977

(Subscription and verification omitted in printing)

Exhibit IV Appended to Verified Petition and Complaint

BEFORE THE NEW YORK STATE
PUBLIC SERVICE COMMISSION

In the Matter of

STATEMENT OF POLICY ON ADVERTISING AND PROMOTIONAL PRACTICES OF PUBLIC UTILITIES

PSC Case No. 27052

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ROBERT O. LEHRMAN, being duly sworn, deposes and says:

1. I am Vice President for Public Affairs of Consolidated Edison Company of New York, Inc. ("Con Edison") and have knowledge of the matters involved in this proceeding and the facts set forth herein.

2. I make this affidavit for the purpose of showing that Con Edison has no adequate alternatives to the use of bill inserts for communicating to our customers our views on controversial matters of public policy.

3. In reaching this conclusion, I considered four alternative means of communicating our views on such issues to our customers: a separate mailing, and television, radio and newspaper advertising.

4. A separate mailing would be prohibitively expensive. We have a monthly basic bill run of 2.8 million.

Postage alone, at first class mail rates, would cost in excess of $350,000. Even at bulk mail rates, postage would cost $210,000. Because of manpower limitations, our mailroom would not be able to handle an additional 2.8 million pieces of mail in any month. We would thus have to utilize an outside contractor for handling such a mailing, the cost of which would be approximately $21,000.

5. Television is not an adequate or effective medium for communicating lengthy messages on complicated subjects to a mass audience. The issues to which the Commission's prohibition apply would require lengthy messages for the expression of our views. Our February 1976 bill insert on nuclear power is a good example. Television is simply not an effective medium for communicating our views on such subjects. Moreover, there are time limitations applicable to television commercials. Ordinarily a 60-second spot is the longest we could obtain. Again, due to the nature of the subject matter, our messages on controversial subjects of public importance would require more than 60 seconds. Further, there are very real questions as to whether television stations would accept advertising which *THEY* consider "controversial." The experience of Mobil Oil—to cite just one example—in being refused advertising time for what appeared to us to be non-controversial messages underscores the seriousness of the problem. Television and radio stations are admittedly frightened of equal time requirements that might be imposed under the Fairness Doctrine. Thus, they seem to err on the side of conservatism in rejecting any comments that may prompt a request for "equal time."

Moreover, even if television stations would accept our comments, it is an expensive medium. Production costs

for a 60-second television message would be approximately $5,000-$8,000. Costs for just one minute of television time in the New York area would range from $3,000 to $10,000, depending on the station and the time. The number of spots that would be required would depend on the importance of the message, and if we produced a message for television, we would ordinarily not run it fewer than 20 times.

6. Radio advertising, while less expensive than television advertising, is inadequate and ineffective for communicating lengthy messages on complex subjects for the reasons noted above. Studies show that commercial radio does not reach the majority of the adult population—a large part of our intended audience—in this area.

7. Newspaper advertising is more expensive in reaching as wide an audience among our customers as bill inserts. Newspaper advertising is also less effective than bill inserts for the reason that in newspapers our message must compete againt news stories, features and other commercial messages. If we were to use newspaper advertising, the most economical way of reaching the bulk of our customers would be to use The New York Times, The Daily News and The Westchester Rockland Newspaper group. A full page ad in these papers costs approximately $12,800, $10,800, and $4,700 respectively. Typesetting would cost an additional $2,000. Here again we would ordinarily run the message more than once. If we ran the message four times, which is the number of times we are required by law to publish proposed rate changes in the newspapers, the cost of newspaper advertising would be in excess of

Exhibit IV Appended to Verified Petition and Complaint

$100,000. Obviously, to state our point of view on a controversial issue, we would use many more insertions.

8. In sum, Con Edison has no adequate alternatives to the use of bill inserts for communicating to its customers its views on controversial matters of public policy. A separate mailing would be prohibitively expensive. Television and radio advertising are not suitable means of communicating lengthy messages on complicated subjects. And newspaper advertising is more costly and less effective than bill inserts.

/s/ ROBERT O. LEHRMAN
Robert O. Lehrman

(Sworn to June 3, 1977)

• • •

Verified Answer of the Public Service Commission of the State of New York

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

Index No. 11163-77

(Caption omitted in printing)

Respondent, Public Service Commission of the State of New York answering the petition herein:

1. Denies the allegations contained in paragraph 1 of said petition.

2. Admits the allegations contained in paragraphs 2, 3, 4 and 5 of said petition.

3. Denies the allegations contained in paragraphs 6, 7 and 8 of said petition, except admits that Consolidated Edison has used bill inserts where required by Commission regulations, and to communicate information and its views to its customers, and that various issues confronting the utility industry have a bearing on its customers, and refers to the Commission's Statement of Policy on Advertising and Promotional Practices of Public Utilities and its Order issued February 25, 1977 appended as Exhibits 1 and 2 to the petition for the full and accurate contents thereof.

4. Admits the allegations contained in paragraphs 9 and 10 of said petition.

5. Denies the allegations contained in paragraphs 11, 12, 13, 14, 15 and 16 of said petition.

6. Denies the allegations repeated in paragraphs 17 and 18 of said petition which are denied in this Answer.

7. Admits the allegations contained in paragraph 19 of said petition.

AS AND FOR A STATEMENT OF THE GROUNDS OF THE ACTION TAKEN BY RESPONDENT PUBLIC SERVICE COMMISSION, AND AN AFFIRMATIVE DEFENSE TO THE PETITION, SAID RESPONDENT ALLEGES:

8. The Commission's action under review herein is a result of decisions in Commission Cases numbered 27036 and 27052. Case 27036 was commenced by Complaint dated May 24, 1976 by Natural Resources Defense Council, Inc. *et al.* which complained of a January 1976 bill insert by Consolidated Edison. The bill insert was a reprint of an article discussing the need for the development of nuclear power to meet the nation's energy demand. The complainants requested a ruling from the Commission seeking redress for the bill insert, prohibiting the company from discussing issues of a political nature in future bill inserts, and the opportunity to submit material for a future bill insert discussing complainants' views concerning nuclear power. A copy of the Complaint and Memorandum of Points and Authorities in Support of Complaint is appended hereto as Exhibit A. [Memorandum omitted in printing]

9. After the submission of complainants' Complaint, petitioner, Consolidated Edison submitted a Memorandum dated June 21, 1976 and a supplement dated July 1, 1976 opposing the relief sought by complainants. In turn, complainants submitted a response to Consolidated Edison's submission. A copy of Consolidated Edison's Complaint and supplement is appended hereto as Exhibit B. A copy of complainants' response is appended hereto as Exhibit C. [Exhibits B and C omitted in printing]

10. Based upon its decision in Case 27052, as discussed hereinafter, the Commission by Order dated February 17, 1977 denied the complaint of the Natural Resources Defense Council, Inc. *et al.*, since that matter had been disposed of within the context of the Commission's decision in Case 27052. A copy of the Commission's Order of February 17, 1977 is appended hereto as Exhibit D.

11. Commission Case No. 27052 was commenced by respondent's Order issued July 28, 1976 issuing a Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices. The Notice discussed the issue of promotional, institutional and informational advertising by utilities. It solicited comments from interested parties by September 13, 1976. A copy of the Commission's July 28, 1976 Notice is appended hereto as Exhibit E.

12. In response to the Commission's Notice, comments were submitted by numerous parties including petitioner, Consolidated Edison. A copy of the comments received by the Commission are appended hereto as Exhibit F. [Omitted in printing]

13. After considering the comments of the parties, the Commission on February 25, 1977 issued its Statement of Policy on Advertising and Promotional Practices of Public Utilities. At the same time, the Commission issued an order implementing certain restrictions on utility advertising. A copy of the Commission's Statement and Order of February 25, 1977 are appended to the petition as Exhibits I and II.

14. By application dated March 22, 1977, petitioner applied for a stay of the Commission's order. By Order

issued March 30, 1977, the Commission denied petitioner's application. A copy of petitioner's application is appended hereto as Exhibit G. The Commission's order denying the application is appended to the petition as Exhibit VI. [Exhibit G omitted in printing]

15. Subsequent to the Commission's Order of February 25, 1977 several parties, including petitioner Consolidated Edison, applied for rehearing of the Commission's Order. Copies of the petitions for rehearing are appended hereto as Exhibit H, except the Consolidated Edison petition is attached to the petition as Exhibits III and IV. [Exhibit H omitted in printing]

16. By Order issued July 14, 1977, the Commission denied the petitions for rehearing including the petition by petitioner Consolidated Edison. A copy of the Commission's Order of July 14, 1977 is appended to the petition as Exhibit V.

17. Respondent, Public Service Commission's directives in its Cases 27052 and 27036 were made only after full consideration of the positions of all parties to the proceedings. The actions taken by the Commission were in all respects just, reasonable and lawful, and in no respects arbitrary, capricious, or unlawful.

WHEREFORE, respondent demands judgment confirming the Commission's determinations sought to be annulled herein and denying the relief sought by petitioner.

Dated: November 28, 1977

(Subscription and verification omitted in printing)

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

Before the

PUBLIC SERVICE COMMISSION

of New York

NATURAL RESOURCES DEFENSE COUNCIL, INC.
SCIENTISTS' INSTITUTE FOR PUBLIC INFORMATION,
FRIENDS OF THE EARTH,
CONSUMER ACTION NOW,
ZERO POPULATION GROWTH, NEW YORK CHAPTER,
JOAN MCCALL,
WILLIAM KLABER III,
SUSAN R. MAINWARING,

Complainants,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Respondent.

COMPLAINT

1. This is a complaint asserting that Respondent Consolidated Edison Company of New York, Inc. (hereafter "Con Edison") has unlawfully discriminated against complainants, Natural Resources Defense Council, *et al.* (hereafter "Complainants"), in violation of Sections 65(3) and 66(12) New York Public Service Law (McKinney 1955 and 1975), has violated the rights of Complainant organizations and their members under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 8, of the New York Constitution, has violated

accounting procedures set forth in 16 NYCRR Chapter II, account 426.4, and has failed to operate in the public interest, by utilizing its customer list and billing process to enclose in its January 1976 billing packet an insert which constitutes a political advertisement presenting an extremely one-sided discussion of the controversial issue of public importance of nuclear power development, charging such advertisement to its customers and declining to allow the billing packet forum to be used for presentation of opposing points of view. A copy of the January 1976 billing insert is attached hereto as Exhibit A. The relief sought herein includes: (1) a declaratory ruling that the expenses of this political advertisement, including the cost of production, printing, postage, envelope and labor, must be borne by Con Edison shareholders; (2) a declaratory ruling that henceforth the Con Edison customer list and billing process is not to be used for political advertising purposes; (3) a declaratory ruling that where the billing process had been used for purposes of propagating one side of an issue of political controversy, as it has in the instant case, the forum must then be opened to access by contrasting points of view; and (4) an order directing Con Edison to enclose an appropriate reply insert, as determined by the Public Service Commission, in the electric bills mailed during the month following the effective date of the order.

2. Complainant, Natural Resources Defense Council (NRDC), is a non-profit membership organization chartered in 1970 under the laws of the State of New York. NRDC has long been concerned about the problems of nuclear energy, is widely regarded as a leading critic of the government's nuclear energy programs, and has filed

several lawsuits on behalf of its approximately 25,000 members seeking better nuclear safeguards and standards, or greater candor, from federal agencies responsible for regulating nuclear power. 6,040 of NRDC's members reside within the New York City metropolitan area. Many are customers of Con Edison.

Complainant, Scientists' Institute for Public Information (SIPI) is a non-profit, membership organization chartered in 1963 under the laws of the State of New York. Roughly 800 of SIPI's 2,000 members reside within the New York City metropolitan area. Many are customers of Con Edison. Since its very inception, SIPI has been involved in nuclear power issues, receiving and disseminating information, and acting as plaintiff in a lawsuit, *SIPI* v. *AEC,* which required the Atomic Energy Commission to prepare an environmental impact statement on its Liquid Metal Fast Breeder Reactor program.

Complainant, Friends of the Earth (FOE) is a non-profit membership organization chartered in 1969 under the laws of the State of California. The New York chapter of FOE, which represents New York State, has approximately 2,200 members, the majority of whom live in the New York City area. Many are Con Edison customers. FOE has been heavily involved in nuclear power issues since its founding; its bi-monthly newspaper, *Not Man Apart,* features a special section on nuclear energy in each issue.

Complainant, Consumer Action Now (CAN) is a non-profit, membership organization chartered in 1970 under the laws of the State of New York. CAN has approximately 20,000 members, the majority of whom reside within the New York City metropolitan area. Many are customers of Con Edison. As a consumer information and education center, CAN has a particular interest in representing the

right of its members not to be charged by Con Edison for the distribution of one-sided information on nuclear power through the customer billing process.

Complainant, New York Chapter of Zero Population Growth (ZPG), is an unincorporated chapter of a non-profit national membership organization involved with population and environmental issues. The New York chapter has approximately 600 members. Many are customers of Con Edison.

Complainant, Joan McCall, is a Con Edison customer who resides at 1170 Fifth Avenue, New York, New York 10029.

Complainant, William Klaber III, is a Con Edison customer who resides at 7 Avenue A, New York, New York 10009.

Complainant, Susan R. Mainwaring, is a Con Edison customer who resides at 310 East 23rd Street, New York, New York 10010.

Those members of Complainant organizations who are Con Edison customers and ratepayers and individual complainants, who are Con Edison customers and ratepayers, have a right to receive information on both sides of the nuclear power debate, have a right not to be charged the cost of a one-sided presentation on the controversial issue of nuclear power development, and have a right not to have the customer list utilized for dissemination of a one-sided presentation on the controversial issue of nuclear power development.

3. Respondent, Con Edison, is an investor-owned public utility with an exclusive franchise to provide electric power service in an area including New York City and Westchester County, New York. Con Edison's rates and

service operations are regulated by the New York Public Service Commission.

4. In its monthly billings, Con Edison regularly encloses a newsletter entitled "Customer News." The newsletter inserted in the January 1976 billing packet contained an article captioned "Independence Is Still a Goal, and Nuclear Power Is Needed to Win the Battle." The article contends that the development of nuclear power is essential to the goal of energy self-sufficiency, that two-thirds of the American people favor building more nuclear power plants, and that the opponents of nuclear power give the impression that their numbers are larger than they actually are. Moreover, Con Edison argues that nuclear power is a proven technology, that it is safe, economical and clean. The company states that "nuclear power is not new or experimental"; that "no member of the public has ever been injured—much less killed—in a nuclear-related accident at a nuclear power plant"; that "uranium is the cheapest energy source available today with which to make electricity"; that the traces of radiation released into the air "are well within established local and national health standards"; that a nuclear power plant cannot explode; and that nuclear power is essential "to free our nation from dependence on foreign oil."

5. The development of nuclear power is a political and controversial issue of public importance nationally and in Con Edison's service area.

6. The Con Edison billing insert presents only one side of this political and controversial issue. Con Edison has completely ignored the substantial and widely-recognized contentions of Complainants and other critics of nuclear power that the operating nuclear reactors in this country

have been plagued by accidents, some serious, runaway costs and poor performance; that the likelihood of a major accident, which could be catastrophic, is greater than the industry and government promoters of nuclear energy would have the public believe; that the potential effects of radiation cannot be accurately calculated at this point in time; that the cost of nuclear power is directly affected by the fact that it is one of the most, if not the most, heavily government-subsidized source of energy in existence; that despite this subsidy the costs of nuclear power have risen and are rising dramatically; that the transportation of radioactive products along the highways and by airplane creates the real potential of a disastrous mishap; that the light water reactor, in operation today, could be subject to a meltdown causing a disastrous release of radioactivity to the environment; that the fast breeder reactor, now under development, theoretically can explode causing a release of radioactive elements; and that according to some expert estimates, if we were to increase our funding of solar energy research and development to a level comparable to that being invested in nuclear fission, this source might produce as large a share of our national energy requirements by the year 2020 as nuclear fission reactors. (Complainants rebuttal to Con Edison's "Customer News" of January 1976 is attached hereto as Exhibit B.)

7. At the time Con Edison mailed its pro-nuclear power bill insert, the New York State Legislature had before it the Safe Energy Act (A-7104-Haley-Kremer). This bill would halt the construction of additional nuclear power plants in the state and spur the development of alternative energy sources. Furthermore, the bill would exempt nuclear plant related expenses from the utility rate base.

8. Con Edison's one-sided discussion of the issues in its January 1976 bill insert clearly was intended to sway public opinion on this controversial bill.

9. In a letter dated March 31, 1976, to Charles F. Luce, Chairman of the Board of Con Edison, a copy of which is attached hereto as Exhibit C, Complainants expressed their concern that the Con Edison ratepayers not be charged with this effort to influence public opinion on this highly complex and controversial political issue of nuclear power development. Complainants requested that the cost of this bill insert, including production, printing, envelope, postage, and labor, be charged to account 426.4, "Expenditures for Certain Civic Political and Related Activities," (16 NYCRR Chapter II), and hence treated as a below-the-line, non-operating expense. Secondly, Complainants expressed concern that Con Edison, a regulated utility with monopoly status, has used its special access to its customer list to present to those customers only one side of this political and controversial issue of public importance, in which Con Edison has a huge personal economic stake. In view of the irreparable harm already suffered by Complainants, and other Con Edison ratepayers, as a result of this use of the customer billing list, Complaints urged that the only appropriate remedy is that the customers of Con Edison must be presented with the opposing point of view, and offered their rebuttal to the January 1976 "Customer News" bulletin as an appropriate response for inclusion in the next Con Edison billing.

10. In a letter dated April 6, 1976, to Marc P. Reisner of the Natural Resources Defense Council, a copy of which is attached hereto as Exhibit D, Joyce H. Tucker, assistant

Vice-President of Con Edison, responded that the utility has a "responsibility and duty . . . to put the nuclear power issue into perspective for our customers;" rejected Complainants request that Con Edison afford its critics an opportunity for rebuttal; and stated that "this bill insert clearly falls in the category of customer information and education and, as such, all costs associated with it are proper operating expenses."

11. Con Edison is an investor-owned public utility which, by virtue of a franchise from the State of New York, has a legal monopoly over the provision of electric power service in New York City and Westchester County, New York. Con Edison is required, in its accounting procedures, to deduct from its income expenditures for political activity, including expenditures "for the purpose of influencing the decisions of public officials or advancing the political objective of the utility." 16 NYCRR Chapter II, account 426.4. *See also,* Federal Power Commission Uniform System of Accounts, Subaccount No. 426.4. Such expenditures are properly charged to the company's shareholders and are not to be considered operating expenses to be borne by the company's ratepayers. Thus, Con Edison may not charge any of the costs of its January 1976 pro-nuclear power bill insert to its customers and ratepayers.

12. Moreover, Con Edison is prohibited by statute from making or granting

> any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject[ing] any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Section 65(3) New York Public Service Law (McKinney 1955).

or from extending

> to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons under like circumstances. Section 66(12) New York Public Service Law (McKinney 1975).

As a government-sanctioned, government-regulated monopoly, Con Edison was required to refrain from using its special access to the customer mailing list through the monthly billing mechanism for purposes of propagandizing this "captive audience" on one side of a controversial political issue in which it has enormous self-interest, and to refrain from charging any of the costs of such political advertising to its utility customers.

13. Having used the billing packet for purposes of propagating its political point of view, however, Con Edison converted the utility's otherwise neutral mailing into a forum for political debate on this controversial public issue. Hence, Sections 65(3) and 66(12) of the New York Public Service Law, the First and Fourteenth Amendments to the United States Constitution, Article 1, Section 8 of the New York Constitution, and proper public policy require that the billing packet forum be made equally accessible to critics of nuclear power development. Con Edison's use of the billing mechanism for presenting one side of the issue

of nuclear power development has conferred an undue or unreasonable preference or advantage upon the company's management and stockholders, and those who agree with Con Edison's point of view on this issue, in violation of Section 65(3) New York Public Service Law. Con Edison has extended to such persons the privilege of access to the facility of the billing packet and has denied this privilege to those who disagree with Con Edison, in violation of Section 66(12) New York Public Service Law. This denial constitutes an undue or unreasonable prejudice or disadvantage to Complainants, also in violation of Section 65(3) New York Public Service Law, and constitutes an abridgement of Complainants' rights, under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the New York Constitution, to communicate and to receive arguments on both sides of an important controversy affecting the public health and safety.

WHEREFORE, Complainants request that the Commission issue:

1. a declaratory ruling that the costs of the January 1976 billing insert, including production, printing, postage, envelope and labor must be charged to account 426.4 and thus borne by the shareholders of Con Edison;

2. a declaratory ruling that henceforth the Con Edison customer list and billing process is not to be used for purposes of political advertising;

3. a declaratory ruling that where the billing process has been used for purposes of advocating one side of a political and controversial issue of public importance, the forum of

the billing packet must then be opened to contrasting points of view;

4. an order directing Con Edison to enclose an appropriate insert, which presents contrasting points of view on the issue of nuclear power development, as determined by the Public Service Commission, in the electric bills mailed during the month following the effective date of the order.

5. an order granting such other and further relief as the Commission deems necessary and appropriate.

(Subscription omitted in printing)

May 24, 1976

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

"Exhibit A"

Con Edison January, 1976

CUSTOMER NEWS

Independence Is Still a Goal, and Nuclear Power Is Needed To Win the Battle

As our nation celebrates the Bicentennial of its political independence, it is still far from winning its battle for energy independence.

The oil-exporting nations have shown they can cripple our economy by tripling or quadrupling the price of oil at will, or by cutting off oil supplies entirely. Yet our nation has made almost no progress toward the goal of energy self-sufficiency.

Efforts are even being made to block development of the energy resources our nation does have—such as off-shore oil and gas, coal and nuclear power. Along with a strong program of energy conservation, development of these resources is essential if we are to break the grip—economic and political—that the oil-exporting countries hold on our nation.

The efforts to slow down or halt the development of nuclear power are of particular concern to us as we seek to meet our obligations as the supplier of electricity to 9 million people.

A recent Louis Harris poll shows that almost two-thirds of the American people favor building more nuclear power plants, with only 19 percent opposed. But opponents of nuclear power sometimes give the impression that their numbers are larger than they actually are—a fact that was also pointed out by the Harris poll.

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

No technology—be it airplanes or elevators—is without risk, and nuclear power is no exception. We do not claim otherwise. However, we believe the benefits of nuclear power far outweigh any potential risk. Therefore, we thought you would be interested in the following facts about nuclear power:

1. *Proven Technology*—Nuclear power is not new or experimental. There are more than 50 nuclear power plants licensed to operate in this country and nearly twice as many in foreign countries. Five are in New York State. By 1990, 16 additional units are planned to be in operation in New York State.

Nuclear power plants make electricity the same way conventional power plants do except that instead of burning coal or oil or natural gas to boil water to make the steam to turn turbine-generators, nuclear plants get their heat from the energy released from splitting atoms.

2. *Safe*—No member of the public has ever been injured —much less killed—in a nuclear-related accident at a nuclear power plant. Working in nuclear power plants is so safe that workers can buy life insurance at the same rates as other people. According to a reactor safety study by Dr. Norman C. Rasmussen of the Massachusetts Institute of Technology, the chances of being killed in an auto accident in any one year are one in 4,000 compared to one chance in 5,000,000,000 of being killed in a nuclear reactor accident. This assumes 100 nuclear power plants in operation—twice as many as in operation today in the U.S.

3. *Economical*—Except for water power, which is not available to Con Edison, uranium is the cheapest energy

source available today with which to make electricity. In 1975, electricity produced at our nuclear power plant at Indian Point saved Con Edison's customers more than $120 million in *fuel costs,* including related taxes. The *total cost* of electricity produced at Indian Point in 1975 was only one-third to one-half the cost of electricity produced at Con Edison's modern oil-fired power plants.

4. *Clean*—Although sophisticated equipment is used to minimize air pollution at fossil-fueled plants, even the most modern oil or coal plants can't match nuclear plants for cleanliness. Nuclear power plants put into the air none of the usual pollutants that come from a conventional power plant. This is because there is no combustion. Traces of low-level radiation are released into the air, but these small amounts are well within established local and national health standards. A former Atomic Energy Commission commissioner, Clarence E. Larson, put things in perspective when he said: "A person living every minute at the boundary of one of our licensed nuclear plants—drinking the discharge water, breathing the air and eating fish from the same water—would have to remain there for more than 200 years to get the same radiation exposure effect as will result from a single chest X-ray.

5. *Can't Explode*—A nuclear power plant cannot explode like a bomb because the arrangements and characteristics of the key ingredients are fundamentally different.

6. *Needed for Energy Independence*—A one-million-kw nuclear power plant saves about 10 million barrels of oil a year—enough oil to provide electricity for a city of about 1,000,000 people. Further, reducing oil imports that much

means about $125 million a year less going to foreign oil-producing countries. If we are going to free our nation from dependence on foreign oil, we will need more nuclear power, not less. Coal is not permitted in New York City for the generation of power, and the supply of natural gas is growing ever shorter. We support development of advanced forms of energy production. But solar electric power, fusion and other future methods for generating electricity are still far from practical everyday use. Nuclear power is here and now.

"Exhibit B"

REBUTTAL TO CON EDISON "CUSTOMER NEWS," JANUARY 1976

With your January Con Edison bill, you received a "Customer News" bulletin with a statement about energy independence and nuclear power. We feel strongly that the opinions presented in this statement as "facts" need to be examined from an opposing viewpoint in order to enable citizens to develop informed opinions on this matter based on a just and reasonable balance of information.

Con Edison claims that efforts are being made to "block development of the energy resources our nation does have —such as off-shore oil and gas, coal and nuclear power." The truth of the matter is that no responsible person or organization wants to "block" the development of coal or off-shore oil and gas. However, environmentalists have raised some legitimate questions about the costs, timing, safeguards, and priorities involved in such development. In a similar manner, we have raised legitimate questions about nuclear energy—the subject under discussion here—because we believe that making ourselves hopelessly dependent on it—which is the course we are presently on—has profound implications that all of us, as citizens of a free society, have a responsibility to think about.

If we are going to build hundreds if not thousands of nuclear power plants during the next few decades, there must be reasonable assurances that nuclear power is acceptably *safe* and *economical*. Contrary to what Con Edison says, there are still no firm assurances that it is either one.

Con Edison Claim Number One: Nuclear power is a proven technology

Although there are 56 operating nuclear reactors in this country, they have been plagued by accidents (some of them serious), runaway costs and poor performance. The average nuclear plant produces only 56 percent of the electricity it can theoretically generate because of chronic reliability problems, and the newer and larger reactors are, surprisingly, much less reliable than the older and smaller ones.

In a recent fifteen-month period there were 861 "abnormal occurrences" in U.S. reactors, including such potentially dangerous phenomena as fuel densification, fuel rod warping, and coolant pipe fissuring. Some of these problems continue to worry and baffle nuclear engineers, and were part of the reason that three senior General Electric engineers quit their jobs in protest last February, saying that nuclear power plants are "technological monsters" which cannot be controlled.

Con Edison Claim Number Two: Nuclear power is safe

The statement that "no member of the public has ever been injured—much less killed—in a nuclear-related accident at a nuclear power plant" is both premature and misleading—somewhat reminiscent of the old tobacco industry claim that it has never been "proven" that cigarette smoking has killed anyone. Nuclear power plants produce radiation, and radiation can cause cancer—but cancer takes ten to twenty years to develop and the cause is usually difficult, if not impossible, to identify.

Although nuclear plants are heavily shielded against releases of radioactivity and their record in this regard has

been good, the real issue is that, should a major accident occur, thousands of people could be killed outright and many more contaminated with potentially lethal doses of radiation. (A single large plant contains the radiation equivalent of *20,000* Hiroshima bombs.) Many eminent scientists, including Nobel laureates, believe that the likelihood of such a catastrophic accident occurring is far greater than the nuclear industry would have us believe. Most of the work on the Rasmussen Study cited by Con Edison was actually performed by staff members of the ardently pro-nuclear Atomic Energy Commission, and the methodology of parts of the study has been criticized by the American Physical Society, the preeminent organization of physicists in this country.

Con Edison Claim Number Three: Nuclear power plants are economical

Nuclear power is the most heavily subsidized source of energy in existence. Most of the multi-billion dollar research and development costs were paid, and are still being paid, by the federal government. All the enormously sophisticated and expensive uranium enrichment plants were built by the government. Uranium exploration is being subsidized by the government (the oil companies do their own exploration). The expensive search for a suitable radioactive waste disposal site is being carried out by the government. Nearly four-fifths of the nuclear insurance taken out by utilities operating nuclear plants is guaranteed by the government. And now nuclear proponents are proposing that more billions in taxpayer dollars be funneled into the financially troubled nuclear industry.

If, despite these hidden subsidies, Con Edison insists upon calling nuclear power "cheap", it should at least tell

its customers about the rate at which the costs of nuclear power have been rising. Nuclear power plants are now 16 percent more expensive to build than scrubber-equipped coal-fired plants, and a team of scientists at Harvard and M.I.T. recently concluded that nuclear plant construction costs are increasing twice as fast as those of coal-fired plants. Meanwhile, uranium fuel which not long ago was expected to cost $17 per pound in 1985 is already difficult to obtain for less than $30 per pound. Nuclear power may be cheaper today if one forgets about its vast government support, but its economic advantage is being steadily eroded.

Con Edison Claim Number Four: Nuclear power is clean

Even though radioactive emissions from a nuclear plant operating normally are relatively insignificant compared to background and medical radiation, each reactor contains an awesome inventory of hideously toxic radioactive products with half-lives ranging upwards of 24,000 years (meaning they must be guarded literally forever). These lethal substances cannot stay in the reactor indefinitely; periodically they must be taken out and reprocessed or disposed of. As a result, they are regularly moving along our highways, and a substance frequently described as the most dangerous ever handled in quantity by man—plutonium—has been flown into Kennedy Airport, despite doubts on the part of some experts that the containers in which the powdered plutonium was shipped could withstand a high impact airplane crash. In forty-five years, according to a 1974 Atomic Energy Commission report, there could be 55,000 annual shipments of highly radioactive spent fuel assemblies alone. At some points in the nuclear fuel cycle, such ship-

ments will make inviting targets for terrorists or deranged criminals, because purified plutonium can be used to make a crude fission bomb and other radioactive substances could wreak havoc if dispersed.

Con Edison Claim Number Five: A nuclear power plant cannot explode

A *light water reactor*—the type in operation today—cannot explode. However, if the cooling water is lost, the core could melt through the bottom of the reactor, causing a disastrous release of radioactivity to the environment. Thus one of the most important safety systems in a reactor is the emergency core cooling system, which is designed to flood the reactor core with water in an emergency and prevent a meltdown from occurring. But full-scale emergency core cooling systems have never been tested, and tests on a miniature-scale model failed repeatedly despite computer predictions that this would not happen.

A new type of reactor being developed today, which Con Edison is pushing very emphatically, is called the *fast breeder reactor*. Unlike a light water reactor, a fast breeder *can* theoretically explode. Such an explosion is admittedly unlikely and would be nothing like an atomic bomb, but some responsible scientists believe that it might be sufficient to rupture the reactor's containment structure and release the viciously poisonous radioactive elements inside.

Con Edison Claim Number Six: Nuclear energy is needed for energy independence

America's use of energy is wasteful and extremely inefficient. According to estimates of the federal government and the Ford Foundation's recently completed Energy Pol-

icy Project, a comprehensive national program of energy conservation and improved efficiency could save as much energy as nuclear power is expected to produce by the end of this century. Such a program would probably be much cheaper, kilowatt for kilowatt, than building nuclear power plants.

Another federal study, commissioned by NASA and the National Science Foundation, predicted that if we were to increase our funding of solar energy research and development to a level more comparable to the funding now going into nuclear fission, this seemingly safe, non-polluting and eternally renewable source of energy could produce nearly as large a share of our national energy requirements by the year 2020 as nuclear fission reactors. A crash program to develop safer alternative sources of energy, combined with tough conservation and efficiency programs and burning of coal and some oil away from densely populated areas, could greatly reduce the need for new nuclear power plants.

We realize that Con Edison has a special problem in that it is currently prohibited from burning coal in New York City. However, this is no reason for Con Edison to paint such a rosy picture of nuclear power for its customers when the actual facts do little to support the company's unjustifiably optimistic and one-sided view.

We strongly support the goal of energy independence. But all citizens today must beware that, in our struggle for self-sufficiency, we do not blindly embrace a solution which could cause grievous public injury and domestic insecurity, at the same time creating an awesome burden of responsibility for future generations of Americans.

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

"Exhibit C"

(Letterhead of Natural Resources Defense Council, Inc. omitted in printing)

March 31, 1976

Mr. Charles F. Luce, Chairman
Consolidated Edison Company
of New York, Inc.
4 Irving Place
New York, New York 10003

Dear Mr. Luce:

In its January 1976 billing packet, Con Edison inserted a "Customer News" bulletin with a statement about energy independence and nuclear power. The article attempts to persuade Con Edison customers that nuclear power is a proven technology, that nuclear power is safe, that nuclear power is clean, that a nuclear power plant cannot explode, and that nuclear energy is needed for energy independence.

The Natural Resources Defense Council, the Scientists' Institute for Public Information, Consumer Action Now, the Environmental Action Coalition, Friends of the Earth, and the New York Chapter of Zero Population Growth are concerned that the ratepayers of New York not be charged with this effort to influence public opinion on the highly complex and controversial political issue of nuclear power development. (All of the above mentioned scientific, consumer or environmental organizations are concerned about the implications of rapid nuclear power development and represent thousands of citizen members in New York City and Westchester County, many of whom share this con-

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

cern.) It is clear that the cost of this bill insert should be charged to account 426.4 (16 NYCRR Chapter II), which includes expenses "for the purpose of influencing public opinion" with respect to issues requiring action by legislative bodies or regulatory agencies, as well as expenses "for the purpose of influencing the decisions of public officials or advancing the political objectives of the utility." Under this classification the cost of the advertisement would not be considered an operating expense chargeable to the Con Edison ratepayers, but properly charged to the company's shareholders.

Our concern, however, is not only with the cost of preparing and printing the pro-nuclear power message. Reason dictates that if a political message is to share an envelope with the customer's monthly bill (and we seriously question the propriety and legality of this practice), the advertisement should not in effect have a "free ride" on the billing process but, rather, should share the costs of postage, envelopes, labor, etc. A proper allocation of the costs between ratepayers and shareholders must include all expenses in the total process.

Moreover, we are concerned that Con Edison, a utility with monopoly status, has used its special access to the customer list to present to those customers only one side of this political and controversial issue of extreme public importance, in which Con Edison has a huge personal economic stake. We believe that some of the "facts" presented in this statement are incorrect or misleading. We also believe that the Con Edison statement misrepresents the goals of those who have challenged some of the federal government's energy programs. For example, the statement that nuclear power is "the cheapest energy source

available today with which to make electricity" relies on certain assumptions which have been disputed by responsible authorities on nuclear power economics and ignores the vast taxpayer-financed subsidies which have been poured into the nation's fission power program; and the claim that nuclear power plants "cannot explode like a bomb" does not apply to breeder reactors and should probably be qualified even in the case of light water reactors because of the potential for steam explosions. Also, we are particularly concerned that Con Edison obliquely accuses environmentalists of trying to "block development of the energy resources our nation does have." Raising questions about the cost, safety, or wisdom of energy programs is a far cry from attempting to "block" them. In short, we believe that the consumers of electrical power must, in fairness, be given the opposing point of view.

We request that you inform us, as soon as possible, how Con Edison intends to classify the costs of this political advertisement, including the total costs of the mailing process. In addition, we offer for your consideration our rebuttal to your allegations regarding nuclear power. We suggest that our response would be appropriate for inclusion in the next Con Edison billing, in order that your customers might receive a fair and well-balanced presentation on this complicated and controversial subject.

Sincerely yours,

Scientists' Institute for Public Information
Natural Resources Defense Council
Consumer Action Now Friends of the Earth
Environmental Action Coalition
New York Chapter, Zero Population Growth

"Exhibit D"

(Con Edison letterhead omitted in printing)

April 6, 1976

Mr. Marc P. Reisner
Natural Resources Defense
Council, Inc.
15 West 44th Street
New York, New York 10036

Dear Mr. Reisner:

The letter of March 31, 1976 to Mr. Luce, signed by you and others, has been referred to me for reply.

We must disagree with your assertion that the cost of the bill insert in question should be grouped with those expenses that are "'for the purpose of influencing public opinion' with respect to issues requiring action by legislative bodies or regulatory agencies, as well as expenses 'for the purpose of influencing the decisions of public officials or advancing the political objectives of the utility.'"

In our view this bill insert clearly falls in the category of customer information and education, and, as such, all costs associated with it are proper operating expenses.

Opponents of nuclear power had made many claims and statements that were not only untrue but—much worse—frightening to members of the public. As the operator of a nuclear facility within our service territory, we consider it our responsibility and duty to answer these statements and to put the nuclear power issue into perspective for our customers.

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

We cannot accept your suggestion that we enclose your proposed "response" with our next billing. Our January bill insert was in fact a response to the anti-nuclear views espoused by, among others, some of the organizations listed in your letter of March 31. These views have been widely disseminated and fully reported in the communications media, both within and outside of our service area.

Sincerely,

/s/ Joyce H. Tucker
Joyce H. Tucker

cc: Alan McGowan
Barbara Niles
Lorna Salzman
Sherry Koehler
Ingrid Eisenstadter

• • •

Exhibit D Appended to Verified Answer of the Public Service Commission of the State of New York

State of New York

Public Service Commission

At a session of the Public Service Commission held in the City of Albany on February 17, 1977

Commissioners Present:

Alfred E. Kahn, Chairman
Edward Berlin, Deputy Chairman
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Charles A. Zielinski

Case 27036—Complaint of Natural Resources Defense Council, Inc. *et al.* with respect to a billing insert of Consolidated Edison Company of New York, Inc. concerning nuclear power.

• • •

By the Commission:

By complaint dated May 24, 1976, Natural Resources Defense Council, Inc., Scientists' Institute for Public Information, Friends of the Earth, Consumer Action Now, Zero Population Growth, New York Chapter, Joan McCall, William Klaber III and Susan R. Mainwaring (Complainants) complain of a bill insert circulated by Consolidated Edison Company of New York, Inc. (Consolidated Edison) in its January 1976 billing. The bill insert discusses the desirability and need for additional nuclear generating facilities as a means of guaranteeing the country's energy independence from foreign oil producers.

The Complainants have requested that the Commission issue a declaratory ruling that the cost of the insert be borne by the shareholders of Consolidated Edison, and that henceforth the Consolidated Edison customer lists and billing process not be used for purposes of political advertising. In addition they assert that where the billing process is used for advertising on one side of a political controversy, the billing packet must then be opened to contrasting points of view; therefore, the Complainants also request that the Commission order that Consolidated Edison enclose an insert representing the opposing points of view on the issue of nuclear power in a future monthly billing. The Complainants have previously written to Consolidated Edison requesting that the company insert their suggested billing supplement in its next monthly bill. The company has refused to do so. By response dated June 21, 1976, Consolidated Edison has opposed the relief sought by the Complainants. A reply dated July 23, 1976 was submitted by Complainants.

Subsequent to the complaint, we issued a Notice of Proposed Policy Statement and Requests for Comments on Advertising by Public Utilities and Electric Promotion Practices. Our resolution of the issues considered there provides the framework in which to consider the requests of Complainants. We have decided as a matter of general policy to disallow expenditures for political advertising when we determine rates for electric utilities. Further, as we discuss in our revised Statement, we have decided to prohibit utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power.

As a result of these determinations, most of Complainants' contentions have been resolved. Our determination

that the billing process should not be used for political purposes makes it unnecessary that we discuss Complainants' request that it be opened to opposing points of view, except insofar as the request relates to bill inserts already published.

We are unable to agree with Complainants' request that we require a remedial bill insert in response to Consolidated Edison's January bill insert. That action would be dictated were Complainants' First Amendment rights to have been violated by "state action" as would have occurred had this Commission authorized Consolidated Edison to circulate its bill inserts.* But we did not. In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), the United States Supreme Court declined to find state action even though the customer disconnection involved there was undertaken pursuant to tariff leaves on file with the Pennsylvania Commission. Here the company's action was taken completely on its own without the consultation or approval of this Commission.

The Commission orders:

1. For the reasons discussed above, Complainants' request for relief from and redress of Consolidated Edison's January bill insert is denied.

2. This proceeding is closed.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

---

* As the United States Supreme Court recently stated, "it is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, 513 (1976).

Exhibit E Appended to Verified Answer of the Public Service Commission of the State of New York

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

NOTICE OF PROPOSED POLICY STATEMENT AND REQUEST FOR COMMENTS ON ADVERTISING BY PUBLIC UTILITIES AND ELECTRIC PROMOTION PRACTICES

(Issued July 28, 1976)

Over the years, the Commission has developed a series of policies relating to advertising by public utility companies and other practices designed to stimulate increased sales of electricity. Some of these policies have in recent months been called into question, and the Commission is considering revising them. To this end, we solicit comments from interested parties to be submitted, in writing, to the Secretary of the Commission, Empire State Plaza, Albany, New York 12223, not later than September 13, 1976.

The promotion of electricity sales

On December 6, 1973, at the height of the energy crisis precipitated by the exporting countries' boycott, the Commission flatly prohibited all sales promotional activities by electric companies. We are now considering relaxing that prohibition.

There is one aspect of the proposed relaxation on which we do *not* solicit comments at this time. That would be such promotion as would be the incidental consequence of efforts by electric utility companies to publicize, explain, and advise consumers on how best to take advantage of time-of-consumption rates. As the companies introduce

such rates, informational activities of this kind are clearly desirable, even where they might have the incidental effect of increasing the aggregate sales of electricity.

The proposition on which we do solicit reactions is that we relax our absolute prohibition of sales promotional activities by electric companies generally, apart from those that are merely ancillary to the introduction of time-of-consumption rates. (The distinction will in important instances be difficult to draw: since the downstate companies are summer-peaking, one purpose or result of rates varying by the season of the year could be to promote the use of electric heating, and, largely because of the very heavy use of electricity involved, this is the most controversial promotion of all.)

On the side of continuing the flat prohibition are such considerations as the following:

1. Electric companies are franchised monopolists, and no public interest or need is served by permitting monopolists to promote sales.

2. It is especially undesirable to cover the costs of such promotional activities in rates, thereby forcing captive customers to pay for activities designed to influence their consumption habits (in contrast with merely providing them with information).

3. Turning specifically to the promotion of electric resistance space and water heating: it conflicts with the national interest in energy conservation to promote additional utilization of electricity, which by its very nature uses approximately 3 Btu's of source energy to deliver 1 usable Btu. Electric resistance heating is therefore inherently inefficient in its use of primary energy, compared with the

direct burning of gas or oil in furnaces, even after making allowance for the greater efficiency-in-use of the electricity than those fuels.

4. The equipment for electric resistance heating is considerably less costly than for gas or oil. Since builders typically have a strong incentive to hold down the first costs of construction, they may already have a distorted incentive to install the former in preference to the latter, even though the result may be to impose markedly higher annual heating costs thereafter on the purchasers, who are frequently, perhaps typically, not in a position to weigh the higher future running costs against the lower initial purchase price in making their purchase decisions. In these circumstances, it is particularly undesirable further to encourage irrational purchase decisions by permitting the promotion of electric heating.

5. The heat pump promises to mitigate some of these efficiency disadvantages of electric resistance heating; however, the effects of its widespread introduction on utility peak load and load factors are uncertain.

Arguing on the side of a relaxation are the following considerations:

1. In major uses, electricity competes with oil and gas, and while we proscribe the promotion of gas, the distribution of heating oils is totally outside our control, and advertising by those distributors freely permitted: in these circumstances, it is not only unfair but produces distorted results for consumers to be freely exposed to advertising messages by one set of competitors, while the other is totally prohibited from communicating with them.

2. Electricity and electrical appliances compete with all other goods and services for the consumer's limited dollars. It is inconsistent with a consumer-sovereign and free enterprise economy for certain goods and services to be denied the right to compete for those dollars while other competitors—many of which may be promoting even less energy-conserving consumption—remain unrestricted. It is the function of a regulatory Commission in such an economy to see to it that prices accurately reflect cost—not to go beyond that and dictate to consumers and businesses, directly or indirectly, how they should allocate their expenditures. Consumers are, to be sure, entitled to protection against misleading advertising, and the foregoing considerations would probably not absolve the Commission from responsibility to ensure that the promotional information supplied by franchised public utilities is in fact not misleading. The proper solution to the possible problem, described earlier, arising from the possibility that builders may have a distorted incentive to install electric resistance heating, because of its lower first cost, is to provide purchasers with reliable info mation about the expected life cycle costs of buildings equipped with different heating systems.

3. The function of the Commission is to see to it that the prices of the services it regulates reflect society's costs in supplying them, and that consumers are well-informed—not to tell consumers what advertising messages they may and may not hear.

4. Gas is in short supply, and in most territories unavailable for use in new construction, so that for most uses the only available alternative to electricity for space heating

is oil. Prohibition of electricity promotion thus contributes to giving oil a monopoly in that market (whether this creates a danger of monopolistic exploitation depends on the effectiveness of competition in the oil industry).

5. While promotion of heating with electricity generated from oil (because of its less efficient use of the primary energy source) runs counter to our national policy of reducing our dependence upon imported oil, the increased use of electricity generated from nuclear fuel and coal would make a positive contribution to that goal.

6. Electric space heating is environmentally preferable to the direct combustion of oil: it is less polluting to burn fuels in central electricity generating stations than in thousands of individual furnaces.

Institutional and informational advertising

The Commission does not flatly prohibit advertising of these kinds, nor does it contemplate doing so. (Institutional advertising is difficult to define except as all advertising that is not fairly clearly intended to promote sales. It usually embraces informational advertising, but in some contexts a distinction between the two is useful.) The issue on which we solicit reactions has to do with the extent to which advertising of these kinds may properly be recovered in rates, as legitimate expenses of doing business and serving consumers.

We do not solicit comments on two kinds of advertising our policy with respect to which is of long standing and essentially noncontroversial:

1. Advertising that provides information of direct use to consumers is a legitimate expense of doing business, and

properly recovered in rates. This would include, for example, appeals for conservation; instructions in the proper use of equipment; information about new rates, billing practices, inspection and meter-reading; reports on matters of direct interest to the public concerning the utility company's service—service difficulties and progress in overcoming them.

2. At the other extreme, political advertising in support of or opposed to specific governmental actions—proposed legislation or referenda—may not properly be covered by rates, on the ground that it is either serving the interest or promulgating the particular opinions of management or shareholders, which may or may not coincide with those of ratepayers. Ratepayers should clearly not be expected to pay to have a company's political views expressed. All clearly political advertising is therefore recorded in a non-operating expense account, below the line, and expenditures recorded in this account routinely excluded from the rate-making process.

It is in the wide area between these two extremes that we seek guidance—the institutional advertising that is not clearly useful to utility customers, on the one hand, or clearly directed toward influencing specific legislation, on the other.

There is advertising, for example, in which a company defends, justifies, or even merely explains and describes its activities. It might be argued, on the one hand, that there is no reason for ratepayers to bear the costs of such self-justification; that it is not of direct usefulness to them. On the other hand, it is extremely difficult to argue, especially these days when public utilities are subjected to frequently unjustified public attack and criticism, that these

are not, within limits, legitimate and indeed inescapable costs of doing business in today's conditions. It seems unreasonable not to afford utility managements under attack an opportunity to explain and justify themselves. It might be argued, of course, that since such expenditures are on behalf of the companies rather than in the direct service of their ratepayers, they ought to be paid for by the shareholders. But if they *are* inescapable costs of doing business, and if, as in our policy, we allow shareholders returns only at the minimum level necessary to attract capital, then at least in principle if we were nominally to disallow these expenditures from rates, we would have to provide a correspondingly larger return on equity. It can be argued, in short, that "disallowances" of such expenditures from rates are nominal only, if not disingenuous.

One of the most controversial kinds of expenditure in this area is advertising that directly or indirectly promotes the merits of nuclear power. Argument over whether the cost of advertising of this kind should be allowed in rates has assumed major proportion. It might arguably be characterized either as informative, and permissible, or political, and to be disallowed.

The Commission has come to the view that exclusion of the costs of such advertising from rates on the traditional grounds that it can be fairly characterized as "political" is no longer adequate to protect the interest of the public generally and of ratepayers specifically. The public issues surrounding nuclear power generation are very complicated, and the public is being beset by discussions on matters in which it is of great importance that all points of view be presented. We feel there is a definite ratepayer interest, therefore, in a free and fair public discussion of this matter, and that utility companies do have a contribu-

tion to make to that discussion, regardless of whether we agree or disagree with the content of their messages in specific instances: after all, the Commission's assessments today of the substantive merits of controversies like these could well prove to be wrong tomorrow. Accordingly, a majority of us has in two recent cases considered advertising that presented the case in favor of nuclear generation to be informational in nature and properly included as a cost in computing rates in modest quantities. Others of us have felt, however, that such an allowance in rates should be permitted only on condition that the company use its funds to provide something like "equal time" to reasonable statements of legitimate opposition to this position. We will appreciate reactions to this latter alternative.

In addition to soliciting advice on these complicated matters, we solicit reactions to an alternative possible approach to this subject. The alternative would retain our present scrutiny of advertising with a view to continuing our traditional policy, described above, with respect to advertising that can clearly be labeled as informational on the one hand and political on the other—with routine allowance of the former and disallowance of the latter; but would abandon the necessity for detailed scrutiny and determination of what to do with advertising that falls in the broad and relatively amorphous midde area.

For that broad middle area of informational and institutional advertising, the suggestion is that we might routinely allow the companies in rates some very small pool of dollars, based roughly on past practices, probably on some sort of sliding scale—say, ranging between 1/10 and 1/25 of one percent in sales, possibly in inverse relationship to the size of the companies—and suspend the vexing and essentially arbitrary process of deciding with respect

to each advertisement whether it should be allowed or disallowed.

This proposal would obviously not solve all the problems we have described: we would still have to determine which advertisements are clearly political and/or self-serving, and specifically disallowed, and which clearly informational and of direct use to ratepayers, and therefore explicitly allowed; and parties in rate cases would still be free to question the propriety of the lump-sum allowance for advertising in the broad intermediate category. On the other hand, it would have the virtue of recognizing that some, modest institutional expenditures are an inescapable and legitimate cost of doing business, and get the Public Service Commission out of the business of any item-by-item content examination and evaluation of past advertisements—an activity in a sense redundant anyhow, in view of the fact that all we really do is set a reasonable level of rates for the future.

If any interested parties have alternative suggestions we would be pleased to receive them. In proposing alternatives, we ask respondents to bear in mind the desirability of reducing the considerable amount of staff and Commission time now consumed in the detailed scrutiny of advertising, and in hair-splitting determinations where the amount of dollars involved is close to minimal.

By the Commission,

SAMUEL R. MADISON
Secretary

• • •

Verified Reply of Consolidated Edison Company of New York, Inc.

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 11163-77

(Caption omitted in printing)

Petitioner-Plaintiff CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Con Edison) by its attorneys, as and for its reply to the new matter contained in the answer of Respondent-Defendant PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (the Commission), states as follows:

THE PETITIONER OBJECTS TO, AND MOVES TO STRIKE, THE NEW MATTER CONTAINED IN THE ANSWER HEREIN UPON THE GROUND THAT THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW SUCH MATTER

1. This is a special proceeding together with actions for a declaratory judgment and injunction commenced by Con Edison seeking, on the grounds of unconstitutionality, to set aside and enjoin enforcement of orders of the Commission issued on February 25 and July 14, 1977, in Commission *Case No. 27052,* which prohibit Con Edison and other public utility corporations in this State from utilizing bill inserts as a means of expressing the views of such public utility corporations on "controversial matters of public policy."

2. *Case No. 27036* is a separate Commission proceeding which was commenced by Complaint dated May 24, 1976 by Natural Resources Defense Council, Inc. and seven other individuals and organizations, seeking various rulings

from the Commission with respect to the use of bill inserts by Con Edison. A Commission order disposing of the Complaint in Case 27036 was adopted at a session of the Commission on February 17, 1977, and was received by Con Edison on or about March 2, 1977. None of the parties to Case No. 27036 sought judicial review of the Commission's February 17, 1977 order in that proceeding, and an Article 78 proceeding for review of that order is now barred by the provisions of Section 217 of the CPLR.

3. In its Verified Answer in this proceeding, the Commission asserts that

> "The Commission's action under review herein is a result of decisions in Commission Cases numbered 27036 and 27052" (Verified Answer, ¶8).

4. In paragraphs 8-10 of its Verified Answer, the Commission describes the proceedings in Case No. 27036 and appends as Exhibits A through D to its Verified Answer the pleadings, briefs and its order in Case No. 27036.

5. After alleging certain matters relating to Case No. 27052 (Verified Answer, ¶11-16), the only Commission proceeding which is before this Court for review, the Commission's Answer concludes by asserting that

> "Respondent, Public Service Commission's directives in its cases 27052 and 27036 were made only after full consideration of the positions of all parties to the proceedings. The actions taken by the Commission were in all respects just, reasonable and lawful, and in no respects arbitrary, capricious, or unlawful" (Verified Answer, ¶17).

6. This Court has no jurisdiction to review the Commission's order in Case No. 27036. The Commission may not seek review of its own orders, and as alleged in paragraph 2 above, none of the parties to that proceeding has sought judicial review of the Commission's order in that proceeding, and an Article 78 proceeding for review of that order is now barred by the provisions of Section 217 of the CPLR.

7. Review of the Commission's order in Case No. 27036 is not necessary for review of the Commission's orders in Case No. 27052. Case No. 27052 was a separate proceeding wholly independent from Case No. 27036 and must stand or fall on its own record; indeed, Case No. 27036 is nowhere referred to by the Commission in its orders or Statement of Policy in Case No. 27052.

8. Consideration of the Commission's Case No. 27036 would be prejudicial to Con Edison by injecting irrelevant issues into this proceeding.

WHEREFORE, Con Edison demands judgment striking paragraphs 8 through 10 of the Verified Answer of respondent, so much of paragraph 17 as refers to Case No. 27036, and Exhibits A through D attached to the Verified Answer; and prays that the relief requested in its Verified Petition and Complaint be granted.

Dated: New York, New York
December 5, 1977

(Subscription and verification omitted in printing)

Judgment of New York Supreme Court, Albany County

Index No. 11163-77

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Courthouse, Eagle and Columbia Streets, Albany, New York, on the 9th day of December, 1977.

PRESENT:

HON. ROGER J. MINER,

Justice.

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

for a judgment pursuant to Article 78 of the CPLR,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Defendant.

Judgment of New York Supreme Court, Albany County

The above-named Petitioner-Plaintiff ("Con Edison") having commenced a special proceeding and actions for declaratory judgment and injunction, under Article 78 and section 3001 of the Civil Practice Law and Rules, by a notice of petition and summons dated November 7, 1977, for judgment:

1. Annulling, vacating and setting aside orders of the Public Service Commission of February 25, and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy;

2. Declaring that the orders of the Public Service Commission of February 25 and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy, violate the First and Fourteenth Amendments to the Constitution of the United States and Article 1, §§ 6 and 8 of the Constitution of the State of New York;

3. Enjoining the Public Service Commission from enforcing its orders of February 25 and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts

as a means of disseminating its views on controversial matters of public policy; and

4. Granting Con Edison such other and further relief as to this Court may seem just and proper,

And the said matters having regularly come on to be heard before me on the 9th day of December, 1977, and Petitioner-Plaintiff having appeared by Joseph D. Block, Esq. and Peter Garam, Esq., in support of the petition and complaint, the Respondent-Defendant having appeared by Peter H. Schiff, Esq., Howard J. Read, Esq., of Counsel, in opposition thereto, LeBoeuf, Lamb, Leiby & MacRae, Esqs., Ronald D. Jones, Esq. and Andrew Gansberg, Esq., of Counsel, having appeared in support of the petition and complaint for National Fuel Gas Distribution Corporation and Orange and Rockland Utilities, Inc., *amicus curiae,* and upon reading and filing the notice of petition and summons dated November 7, 1977, the petition and complaint, verified on the 7th day of November, 1977, and exhibits I through VI annexed thereto, the answer, verified on the 28th day of November, 1977, and exhibits A through H annexed thereto, and the reply, verified on the 5th day of December, 1977, and upon all the pleading and proceedings heretofore had herein, and after due deliberation the Court having made and filed a decision in writing on the 17th day of February, 1978, in favor of Petitioner-Plaintiff, and against Respondent-Defendant,

Now, on motion of Joseph D. Block, Esq., attorney for Petitioner-Plaintiff, it is

ADJUDGED AND DECREED that the relief requested in the petition and complaint be and the same hereby is granted in full; and it is further

ADJUDGED AND DECREED that the orders of the Public Service Commission of February 25 and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy, be and the same hereby are annulled, vacated, and set aside; and it is further

ADJUDGED AND DECREED that the orders of the Public Service Commission of February 25 and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy, are hereby declared to violate the First and Fourteenth Amendments to the Constitution of the United States and Article 1, §§ 6 and 8 of the Constitution of the State of New York; and it is further

ADJUDGED AND DECREED that the Public Service Commission be and hereby is permanently enjoined from enforcing its orders of February 25 and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy.

Judgment of New York Supreme Court, Albany County

Dated March 2, 1978, Hudson, N.Y.

Enter.

/s/ Roger J. Miner
Justice of the Supreme Court

Guy S. Paquin

March 6, 1978

OFFICE OF
ALBANY COUNTY CLERK

MAR 6 1:11 PM '78
ALBANY, N.Y.

Notice of Appeal of the Public Service Commission of the State of New York to New York Supreme Court, Appellate Division, Third Judicial Department

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

Index No. 11163-77

(Caption omitted in printing)

PLEASE TAKE NOTICE that the above named Respondent-Defendant hereby appeals to the Supreme Court, Appellate Division, Third Department, from the Judgment of the Honorable Roger J. Miner, dated March 2, 1978, and entered in the Office of the Clerk of the County of Albany, New York, on the 6th day of March, 1978, and from each and every part of said Judgment and Order.

Dated: Albany, New York
March 6, 1978

(Subscription and addressees omitted in printing)

Order of New York Supreme Court, Appellate Division, Third Judicial Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 19th day of June, 1978.

Present:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
Associate Justices.

County Clerk's Index No. 11163-77

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner-Respondent,

For a judgment pursuant to Article 78 of the CPLR,

——against——

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent-Appellant.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff-Respondent,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Defendant-Appellant.

Order of New York Supreme Court, Appellate Division, Third Judicial Department

The appellant, Public Service Commission of the State of New York having appealed from a judgment of the Supreme Court of Albany County, entered on the 6th day of March, 1978, in the office of the clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Howard J. Read, Esq., of counsel for appellant, and by Joseph D. Block, Esq., of counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 27th day of July, 1978, Justices Sweeney and Main dissenting, it is hereby

ORDERED that the judgment entered March 6, 1978 be and hereby is reversed, on the law, without costs, and the order declared constitutional.

ENTER:

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: August 2, 1978.

A TRUE COPY:
JOHN J. O'BRIEN
Clerk

Notice of Appeal of Consolidated Edison Company of New York, Inc. to Court of Appeals of the State of New York

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 11163-77

(Caption omitted in printing)

PLEASE TAKE NOTICE that Consolidated Edison Company of New York, Inc. ("Con Edison"), relying upon questions directly involving the construction of the provisions of Article 1, Sections 6 and 8 of the Constitution of the State of New York and the First and Fourteenth Amendments to the Constitution of the United States, appeals as of right to the Court of Appeals of the State of New York from the order of the Appellate Division, Third Department, entered in the office of the Clerk of the Appellate Division on August 2, 1978, which order declared an order of the Public Service Commission constitutional and which order reversed on the law the judgment of the Supreme Court herein, entered in the office of the Clerk of the County of Albany on March 6, 1978. Justices Sweeney and Main of the Appellate Division, Third Department, dissented on a question of law in favor of Con Edison from the order of reversal and would vote to affirm the judgment of the Supreme Court on the law. The judgment of the Supreme Court annulled, declared unconstitutional, and permanently enjoined enforcement of orders of the Public Service Commission prohibiting utilities, including Con Edison, from utilizing bill inserts as a means of dis-

seminating their views on controversial matters of public policy.

PLEASE TAKE FURTHER NOTICE that Con Edison appeals from each and every part of the order of the Appellate Division and from the whole thereof, pursuant to Section 5601(a) and (b)(1) of the Civil Practice Law and Rules.
August 9, 1978

(Subscription and addressees omitted in printing)